# No. 10,807

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

*Appellants,*

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

*Appellees.*

---

## APPELLANTS' OPENING BRIEF.

---

S. S. TIPTON,
W. N. MULLEN,
315 Montgomery Street, San Francisco,
*Attorneys for Appellants.*



PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

### Cases

## Codes and Statutes



## Texts

No. 10,807

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

*Appellants,*

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

*Appellees.*

---

## APPELLANTS' OPENING BRIEF.

---

### STATEMENT OF JURISDICTION.

The libel, filed in the District Court on the 25th day of January, 1944, was to review a compensation order of a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. (33 U.S.C.A.

Section 901 et seq. (Ap. 41-44.) The injury occurred during the month of February 1938 in the district (Ap. 42) and the order was made on the 11th day of January, 1944. (Ap. 50.) The District Court therefore had jurisdiction of the libel. (33 U.S.C.A. Section 921(b).) A decree dismissing the libel and affirming the order of compensation was entered on the 10th day of May, 1944. (Ap. 115.) Petition for allowance of appeal to this Court and order allowing the appeal were signed on the 15th day of May, 1944. (Ap. 118 and 122.) This Court therefore has jurisdiction on appeal to review the said decree under Section 128 of the Judicial Code. (28 U.S.C.A. Section 225.)

---

**STATEMENT OF PLEADINGS.**

The compensation order of the deputy commissioner conformed to the findings and was against the employer and its insurance carrier. (Ap. 41-44.)

By their libel to review the order the libelants sought to set aside the finding that the statute of limitations had not run against the claim of appellee Steffen, and it was contended said order and award was contrary to law.

Exceptions to the libel were filed by appellees. (Ap. 67-83.) The exceptions were sustained and the libel dismissed and a decree entered confirming the compensation order. (Ap. 113-115.) An opinion was rendered in the District Court. (Ap. 104-109.) Find-

ings of fact and conclusions of law preceded the decree. (Ap. 109-112.)

---

**SPECIFICATIONS OF THE ERRORS RELIED UPON.**

Appellants rely upon their assigned errors, Nos. II, III, IV and V. (Ap. 118-120, and 144.)

---

The effect of the foregoing is that the deputy commissioner, as well as the Court below, erred in finding that Section 930(f) of the Longshoremen's and Harbor Workers' Compensation Act was retroactive. Our contentions, points, statements of law and references to statutes are so co-mingled that the following is made without reference to any assignment in particular, save and except assignment of error designated IV (Ap. 119-120), and as particularly set out herein under the caption "Appellants' Contentions", pages 10-11.

---

**STATEMENT OF CASE.**

One sustained an injury under the Longshoremen's and Harbor Workers' Compensation Act and within a few days, at his own expense, obtained medical treatment for a back condition. Thereafter he was disabled for a few days and did not work and was paid his salary. He then continued with his employment for some six months during which time he continued to get medical treatment, which culminated

with his going to a hospital where he remained some two and a half years. He was injured in February, 1938. On June 25, 1938, the Longshoremen's and Harbor Workers' Compensation Act was amended to provide that time did not begin to run as a bar against a claim of injury until reported by the employer to the Deputy Commissioner. No report was filed with the Deputy Commissioner and the employee quit work on August 5, 1938, and was totally disabled up to the time he filed application with the Deputy Commissioner on January 20, 1941. The Deputy Commissioner and the Court below held that the plea of the statute of limitations was not good as against the claim because the amendment of June 25, 1938, was retroactive in effect. It is appellants' contention such provision was not retroactive; that the plea of the statute of limitations was good as against the claim, and that the first suffering of disability did not occur on August 5, 1938, but rather in February, 1938, and in any event, for there to be an injury under such act there is no requirement that there be injury and disability.

---

**FACTS.**

Respondent Steffen had worked for some considerable period of time as a watchman on a vessel out of service, and part of the time lived aboard. He alleged some time in February, 1938, he slipped and fell while going from the vessel and injured his back so painfully he sought medical attention and for a few days did not work, but was paid his salary with full knowl-

edge of the facts had by his employer's representative, Mr. Cordes. His condition became so bad he had to quit work on August 5, 1938.

Mr. Cordes denied any knowledge of a report of injury ever having been given him by Mr. Steffen, but said he had complained long before 1938 of a painful back and his condition became so bad that on August 5, 1938, he went to the Marine Hospital in San Francisco, where he was entitled to free care. He was paid his salary for at least two weeks after entering the hospital.

Application for hearing before the Deputy Commissioner was not filed until January 20, 1941, and no compensation or medical treatment was provided by the employer or carrier, except to the extent of salary paid as aforesaid.

The following direct quotations from the testimony are important and from the previous record in Case No. 10,361, the following quotations and page references are made:

> "21. Have you received any wages since injury? Yes.
> If so, from and to what date? 8-31, 9-15, 9-30-1938. While in hospital."
> Case No. 10,361, page 23.

Originally it was contended by Mr. Steffen the statute had not run because of a situation of estoppel or laches.

> "Mr. Burns. I claim that this case comes within the Longshoremen's Act, that he was employed by the Hillcone Steamship Company, that

he was injured as he states here, sometime prior to August 8, 1938, and there was notice given to Mr. Cordes, his employer; that his employer took him to the hospital, and later up here; and they have acknowledged that they have told this man repeatedly, after having paid him several payments while in the hospital, they told him that he would be taken care of and get a lump sum, and it is finally gotten to a point where they will not answer his letters or communicate with him. First they came here and told him everything would be all right, everything would be taken care of, and I contend that the man is entitled to his compensation from the date of injury up to the present time, and whatever admittance papers were made out for the man were made out by them, whatever classification they put him under when they put him in the Marine Hospital, Mr. Cordes was present and he handled it."

Case No. 10,361, page 28.

"Q. Now what was done about you as soon as you fell?

A. (Mr. Steffen) Well, I immediately went over to the yard, and Mr. Cordes was waiting for me, and I said, 'I don't think I can make this trip, I just had a terrible spill,' and he said, 'Hell, you will be all right,' so I got in and I drove but it pained me, and we got as far as Lancaster, and that is the reason I bring out the flood conditions, because it started to rain for a couple of days, so I turned the car around and I said, 'We can't get through,' and as I did, it got me, and it locked on me.

Q. What locked on you?

A. My back, and I said, 'It's got me,' and I told him I fell off the ship getting down here, and he said, 'You will be all right,' and then we went down to the Jonathan Club.

Q. Where is that?

A. Figueroa Street, Los Angeles, and we went in there and he immediately went down to see me, and he took a hold of me and worked on my back, and he said, 'You got a bad back,' and I went back up to the room, and we had a few drinks and we stayed around and we didn't go back for three days, and on the second day, we spent that in Mr. Cordes' pent house, and then it was very noticeable that I had to have a doctor, but we thought we would get by anyway, and the next morning we went down to the doctor and he taped me up.

Q. What doctor?

A. Now you got me.

Q. Did Mr. Cordes send you?

A. No, I went by myself.

Q. And you can't remember his name?

A. No, then later on, it was two days later—and every morning, the second morning at the Jonathan Club, they had to come in and help me to get in the steam room, and after the steam they rubbed a liniment on my back to relieve me a little, and then we returned to Long Beach and I went aboard the ship for a few days, and then I went to a chiropractor and I went to an osteopath, and I went to Dr. Carroll, all kinds of doctors."

Case 10,361, pages 38-39-40.

Further covering treatment had in February, 1938, see the following:

"A. The latter part of February.

Q. Was it an M. D. or an osteopath?

A. Yes, an M. D.

Q. How did you happen to go to him?

A. Mr. Cordes and I were in Los Angeles and we were going to drive to San Francisco, and we went to Los Angeles and the back bothered me and we stopped at the Jonathan Club and then I had severe pain and could hardly get around, and we went to the steam room and Eddie, the chief rubber there, told me, he was a friend of Mr. Cordes, 'You got a bad back there, you better go to a doctor,' and I said, 'I will get by all right, I will go to the Public Health when we get back. Mr. Cordes is going to send me over, and three nights I laid around, stayed at his pent house and while we were at the pent house I was so sick my back was throbbing so that I couldn't straighten it up and I went to some doctor, the lady that owned the pent house told me about, and I went to him and he said, 'All I can do is that I can tape it,' that is the first doctor."

Case 10,361, page 71.

"A. No, I told him I had a bad back and he said, I can't adjust it,' but he did adjust the fore part.

Q. You didn't tell him about the fall?

A. Sure, sure.

Q. Did you see any one after that?

A. I have $25.00 worth of receipts from Dr. Godfrey, something like that.

Q. Where is he?

A. In Long Beach.

Q. What kind of a doctor is he?

A. An M. D. I have his receipts for you, if you wish.

Q. Now along about when did you go to him?

A. I had about ten treatments from Dr. Settle and he said, 'It is absolutely impossible for me to do anything because I can't give you the correct adjustment,' so I went to this other doctor, Dr. Godfrey, and he gave me a corset with a cork in the back here, and he also treated me electrically, some electric treatments.

Q. That was about when?

A. March I think, I think that was in April, March or April, and then I went over to Pedro later on.

Q. How long were you under treatment by Dr. Godfrey?

A. Darned if I know, I couldn't tell you that, I have got about $25.00 worth of receipts.

Q. For visits?

A. Yes."

Case No. 10,361, pages 72-73.

"Q. Have you received any wages or compensation or indemnity from that time to the present?

A. Yes, there was two checks, I think I have one here for August, I think I have one, I gave you the last time, it was for July, I think that is August (hands slip to Mr. Jacobson).

Q. For August 16th to 31st, no year on it, you say this is for 1938?

A. Yes, I had two and I think in my last hearing when I testified, I think you will find the other one was for July and one was August."

Case No. 10,361, pages 78-79.

Mr. Steffen said the last time he saw anyone from the employer was when he saw Mr. Cordes shortly after his marriage, which the record shows was in June, 1940.

The Deputy Commissioner found as disclosed by the record in Case No. 10,807, pages 42, 43 and 44, that during the month of February, 1938, claimant sustained personal injury which arose out of and in the course of his employment, it being in the form of a contusion which activated and exacerbated a previously quiescent osteoarthritis of the back causing it to become painful and subsequently disabling. That Mr. Cordes, his superior, then and on many occasions thereafter knew he complained of pain as a result of the fall; and that the employer did not make a report of the injury to the Commission or the Deputy Commissioner as required by Section 930(f), such amendment having been added on June 25, 1938, at least four months after the injury was allegedly sustained.

The Deputy Commissioner further found the claim was filed within time, although the statute was plead, because notice of claim was not given as aforesaid. It was found no medical treatment was furnished by the employer and "that claimant continued in his employment with distress and under medical care until August 5, 1938, when he entered said United States Marine Hospital. His wages were paid to and including August 4, 1938." It was found that compensation was due in the amount of $4410.71, no part of which had been paid.

### CONTENTIONS OF RESPONDENT STEFFEN.

In the Court below Appellee Steffen said the question was, "Did the amendment of Section 30 of the Act by adding thereto Subdivision (f) on June 25, 1938, extend the time within which the Respondent, Albert V. Steffen, could properly file his claim with the Commissioner under the provisions of Section 13(a) of the Act?" Case No. 10,807, page 85. Also see Case No. 10,807, pages 67-84.

---

### REVIEW OF OPINION OF COURT BELOW.

The decision stated there were two questions for decision, and one was whether or not the Commissioner erred as a matter of law in failing to find the claim barred, and in applying the provisions of Section 930(f) of the Act to the claim. It said that the legislation involved was remedial and therefore should be liberally construed and if the case were looked at solely in light of Section 913(a) the award would obviously not be in accordance with law, but that the correlative and cooperative provisions of Section 930(f) of the Act should be applied, thereby saying that such section was retroactive in its effect.

It also said the time limit prescribed by Section 913(a) did not commence to run until the right to further payment of compensation was controverted, and relied on the case of *Marshall v. Pletz,* 1942 A. M. C., Vol. 1, 627 at pp. 631-632. It contended since the disability was found to commence on August 5, 1938, and the basis for a claim under the Act is the exist-

ence of disability for work resulting in a loss of wages, it being shown the man did get his wages prior to August 4, 1938, it was therefore not until then that the one year period began under Section 913(a) to the exclusion of other provisions of the Act, but since 930(f) had not been complied with, the filing of an application on January 25, 1941, could not be said to be barred. It did not believe Section 930(f) could be disregarded in ascertaining whether or not the *substantive right* to compensation had lapsed, regardless of whether his statutory right accrued on the date of the accident. It insisted, after admitting the right to compensation was a substantive one, that Section 930(f) in no manner affected vested or substantive rights nor did it impair the obligation of contract because the relationship involved was purely statutory and a *mere* change of procedure or substitution of remedies *may* operate retrospectively without running counter to any established principle of construction. It said the right to invoke the bar still existed, but Congress imposed after the injury an additional procedural requirement, and because of the failure to follow that requirement there had been no prejudice to appellants. (Case No. 10,807, pp. 104-109.)

---

**APPELLANTS' CONTENTIONS.**

As stated in the Assignment of Errors in Case No. 10,807, page 118, we say the Court erred in sustaining the Deputy Commissioner's exception to the libel requested below, and in supporting the Deputy Com-

missioner in finding that Respondent Steffen filed his claim within the time required by law, although he did not file his claim for benefits within one year of the date of injury in accordance with Section 913(a). Any claim for compensation benefits to which he might be entitled was barred by the running of time. There was no jurisdiction in the Deputy Commissioner to entertain the application. There is no justification in law or fact for the finding the time did not begin to run against the claim for disability until loss of wage occurred. The reliance placed by the Court below on *Marshall v. Pletz,* supra, is of no authority and effect because it was overruled, annulled and reversed by the United States Supreme Court on January 4, 1943. (1943 A. M. C., Vol 1, p. 9.) The claim was definitely barred by the running of time and the Commission exceeded its authority and committed an act in excess of its jurisdiction in deciding no claim accrued or vested in February, 1938, even though the claimant then obtained medical treatment and was disabled for a period of days when he rendered no service and was paid his salary.

---

### SECTIONS OF THE LONGSHOREMEN'S ACT ESPECIALLY RELIED UPON.

Section 902, Subdivision 2, defines "injury" to mean accidental injury or death arising out of or in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from

such accidental injury, and includes an injury caused by the wilful act of a third person directed against an employee because of his employment.

Section 902, Subdivision 10, defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." As will be shown later on, Section 930(f) refers not to disability but to injury, and Section 913(a) refers to injury and not disability.

In Section 902, Subdivision 12, "compensation" means "the money allowance payable to an employee or to his dependents" as provided by this Act, "and includes funeral benefits provided therein."

The words "medical treatment" or anything of similar reference are not defined but we understand the word "compensation" to include any amount the claimant might be in a position to claim in reimbursement of medical treatment obtained at his own expense after notice of injury to the employer and refusal to provide it. See Section 907.

Section 913(a) provides the right to compensation "shall be barred unless a claim therefor is filed within one year after the injury, * * * except that if payment of compensation has been made without an award on account of such injury * * * a claim may be filed within one year after the date of the last payment."

At the time of the injury Section 930 carried five subdivisions not here pertinent. Thereafter there was

added, on June 25, 1938, subdivision (f) which in effect says where the employer or carrier has been given notice of the injury or has knowledge of any injury and does not file a report of it, Section 913 (a) shall not begin to run against the claim until such report shall have been furnished as required by this subdivision (f) of Section 930. In other words, this requirement is based on the knowledge of an employer of the injury having occurred, which of course was denied by the positive testimony of Mr. Cordes. The Deputy Commissioner relied for support on the uncorroborated, uncertain, and in several instances, impeached testimony of Respondent Steffen.

---

**THE RIGHT TO COMPENSATION ARISES OUT OF A CONTRACT AND THE RIGHT BEGINS WITH AND DEPENDS UPON THE EXISTENCE OF A CAUSE OR RIGHT OF ACTION.**

Mr. Steffen, if he sustained an injury as found, had a cause of action therefor at that time and not when he desired to initiate proceedings.

Without a cause of action there was no right to claim. The cause of action, of course, existed because it has been determined by statute that as a matter of contract the right to compensation benefits is read into each contract of employment. It is then the violation of this right to be free of industrial injury from which the cause of action arises.

A cause of action cannot extend more to one than the right from which it flows and there cannot be a right unless it be in existence, determinable and

vested. If this be not true, there would be no cause for an action.

There cannot be a cause of action because an injury has occurred and then another cause of action because disability has resulted from such injury. There can be only one cause of action because of the violation of one right, namely, in this case, to be compensated for by the payment of money for an industrial injury, or furnished medical treatment with the right of reimbursement therefor if not provided upon notice of the injury.

As pointed out heretofore, the entire right to proceed depends upon and flows from the time of injury and, we say especially so, in this case when there was the prompt obtaining of medical treatment with the knowledge of the employer, as found, but for which the employee paid, and the staying away from work during which time full wages were paid by the employer.

Section 930(f), as we will show herein, is not retroactive in its provisions and therefore can only concern itself with injuries or accidents which occurred and were sustained after the addition of this subdivision.

There was no need to file such a form by the employer at the time of the injury or accident, and especially when there was a full awareness thereof, as found by the Deputy Commissioner.

It cannot be said that there was no right to compensation, which we presume to be money in lieu of

wages, until August, 1938, because no injury occurred until there was disability. We say that if the Longshoremen's and Harbor Workers' Act had so intended, it would have so provided. Furthermore, what if the man had never lost time and merely wanted reimbursement for his medical expense? Then would it be said the time began?

Furthermore, assume that there was such an injury with the establishment of a permanent disability with no loss of time. Would it be said that since there was no suspension of work and no stoppage of pay that there was no right to file for compensation for a permanent disability because there had been no loss of wage?

It has been held many times that the payment of wages, when there was disability, is in lieu of compensation and credit may be taken therefor. See *State Comp. Ins. Fund v. Pillsbury,* D. C. Calif. 1939, 27 F. Supp. 852.

In view of the foregoing there was payment of salary in lieu of compensation for two, three or maybe four days right after the injury in February, 1938. There certainly was disability as pointed out in the transcript of the record and there was then an injury, accident and disability all at the same time. At said time there was created the right for reimbursement for medical treatment obtained by Mr. Steffen.

The foregoing is supported by the following citations and comments.

In *Guy v. Stoecklein Baking Co.,* 1 Atl. (2d) 839, it was said:

> "A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation: 37 C. J. 686. Statutes of the latter kind are in the nature of conditions put by the law upon the right given: *Peters v. Hanger,* 4 Cir., 134 F. 586, 588; *Wheatland v. Boston,* 202 Mass. 258, 88 N. E. 769.
>
> In Pennsylvania, this distinction is recognized in those cases which hold that a pure statute of limitations must be pleaded (*Prettyman v. Irwin,* 273 Pa. 522, 117 A. 195), while it is not necessary to so plead in the case of a condition put by the law upon a substantive right given, even though such condition is sometimes spoken of as a statute of limitations: *Martin v. Pittsburg Rys. Co.,* 227 Pa. 18, 21, 75 A. 837, 26 L. R. A., N. S., 1221, 19 Ann. Cas. 818; *First Pool Gas Coal Co. v. Wheeler Run C. Co.,* 301 Pa. 485, 489, 152 A. 685. The latter cases also throw light upon the distinction between the two kinds of limitations.
>
> The contention which the carrier now seeks to assert is purely statutory and is a part of the substantive right to maintain an action for compensation and does not deal with the mere remedy for an otherwise subsisting right. The very act which gave to the claimant the right to maintain an action of this class expressly provided that

> such right should be forever barred unless the parties agreed upon the compensation payable or filed a petition as required: *Ratto v. Penn. Coal Co.,* 102 Pa. Super. 242, 247, 156 A. 749. 'Where a statute fixes the time within which an act must be done, as, for example, an appeal taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent—an allowance of the act *nunc pro tunc.*' "

*Thomas v. Town of Savannah Beach,* 17 S. E. (2d) 747, held the right to compensation is a vested right and is not remedial and the right to set off because of a subrogation recovery could not be had even though the act provided such set off at the time the claim was filed, the reason being that at the time of injury there was no such right to set off.

Also see: *Southern Underwriters, et al. v. Lewis, et al.,* 150 S. W. (2d) 162.

*Preveslin v. Derby & Ansonia Developing Co.,* 151 Atl. 518, holds the right to workmen's compensation determined by statute in force at the time of injury was a "vested right" which could not be affected by an act validating an unconstitutional statute. There it was further held a statute purporting to change the rate of compensation for injury occurring previous to the amendment is the "impairment of obligation" and any law changing intention and legal effect of the original parties, giving to one the greater and to the other less benefit in contract, "impairs obligation".

The reason for this is that retrospective laws impairing obligation of contracts or substantial vested rights violate the United States Constitution, Article I, Section 10, and Constitutional Amendment 14. It was further said the Legislature can not change procedure affecting past transactions in such way as to prevent judicial control of that situation.

In *Turley v. John Hancock Mut. Life Ins. Co.,* 173 A. 163, it was said rights are "vested" when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.

In *Fehland v. City of St. Paul,* 9 N. W. (2d) 349, it was said:

> "The (compensation) act creates new substantive rights and is not a mere amendment of the common law. It goes far beyond merely affording new remedial rights for old substantive rights. It works a fundamental change in the obligations of employers to their employees. The right to compensation given by the act is independent of fault. It is not based on tort, but is of a contractual nature. A basic thought underlying the act is that the business or industry affected shall in the first instance pay for accidental injuries as a business expense or a part of the costs of production."
>
> 6 Dunnell, Dig. & Supp. 10385.

In *United States v. Heinrich,* 12 F. (2d) 938, Dist. Ct., D. Montana, it was said Congress cannot enact a law which would destroy, impair or injuriously affect rights that have been vested under a former

Congressional enactment, and to enforce an enactment effective after the right vested would require a payment in violation of the Federal Constitution. Also see *Chase v. United States,* 222 Fed. 593.

---

THE DATE OF INJURY.

An injury is a damage to a right or person. Mr. Steffen had a damage to his back at the time he fell. He then had pain and continued to have pain to the time of filing his application, although the extent of disability varied. The following cases show that it was improper for the Court below to say it believed the injury did not occur until there was disability, forgetting for the moment of course that there was disability at the time of the injury as we have heretofore pointed out.

In *Otis v. Parrott, et al.,* 8 N. W. (2d) 708, a truck driver sustained a broken leg and arm when his truck turned over on January 4, 1939. In March, 1939, he developed tuberculosis, from which he died on July 21, 1939. It was said the "date of injury causing such death" is within statute providing that no compensation proceeding shall be maintained unless such proceeding shall be commenced within two years from the date of the injury causing death, which was January 4, 1939.

*Di Giorgio Fruit Corp., et al. v. Norton,* 93 F. (2d) 119, cannot be taken as an authority to the effect that the statute does not start to run until there is a loss of time for which one would be entitled to compensa-

tion. This case merely held that where one sustained an injury but did not know until within one year of the time he filed his claim that the condition from which he suffered was due to such injury, then it was not until that time the statute started to run. This is similar in effect to the case of *Glantz v. Ind. Acc. Com.,* 11 Cal. App. (2d) 624, and cases involving industrial diseases.

This is not a case where the man had some sort of an unusual incident occur and then later suffered a condition which was found to be related to such incident. In other words, if one knows he has pain, he knows he has been injured. Any doctrine based on the theory that even though one has pain and knows he has been injured, the statutory period does not start to run until he has lost time, is inconsistent. Furthermore, in this case the Court has lost sight of the fact that this man immediately after his fall in February, 1938, had a painful condition and went with his employer and obtained treatment therefor. During this time he was paid his salary and the salary, therefore, was in lieu of compensation for then he rendered no service. Since compensation, if there is more than eight weeks' disability, is payable from the first day of disability (see Section 906), would it not follow that in this case there would have to be a finding that during those first few days of total disability he was compensated by payment of salary by the employer? This certainly would then make those first few days he was away from work the time when he was disabled and for which he could later claim compensation, if the

payment of wage was not in lieu of compensation, inasmuch as it has been found he was disabled for more than eight weeks.

In view of the foregoing we cannot see how the opinion of the Court below, which rests on no authority, can be accepted to hold there is not an injury until one has to leave work and is entitled to compensation. It discards the very theory of when a cause of action occurs and the common accepted understanding and definition of the word "injury". For there to be an injury there does not need to be disability and the Longshoremen's Act does not so provide, and in any event, Mr. Steffen was entitled to compensation for the days he received treatment and then could have claimed reimbursement for his medical expense.

In *Winslow v. Carolina Confer. Assn.,* 211 N. C. 572, it was said:

> " 'The right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Accident Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commissioner within one year thereafter' * * * For this reason, where a claim for compensation under the provisions of the North Carolina Workmen's Act has not been filed with the Industrial Commission within one year after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident (see *Hardison v. Hampton,* 203 N. C. 187, 165 S. E. 355) the right to compensation is barred."

*Liberty Mut. Ins. Co. v. Parker,* 19 F. Supp. 686, Dist. Ct., D. Maryland, is a longshoreman's case where in December, 1934, one slipped on a ship's deck, catching his weight on his right thumb. He mentioned this to his foreman but no injury was apparent until some time thereafter when a knot appeared, which subsequently proved to be a ganglion. About a month thereafter the employee was told by his physician the ganglion would have to come out. Other medical advice he obtained was that if it did not pain, to do nothing about it. He made no complaint to the employer until February, 1936, when he noticed the fingers of the right hand were being affected. He asked for medical treatment but continued to work until May 5, 1936, when the employer gave him medical treatment. The employer made no report of the accident to the Deputy Commissioner until February, 1936, and the claimant filed no claim until April, 1936, more than a year after the accident. The Court found the claimant was not actually disabled from the time of the accident until May 5, 1936. The Deputy Commissioner held the statute of limitations had not run. The Court reversed the Commission and said the swelling in the back of the hand became apparent on the evening of the accident and within a month he was advised it should be cut out. His work was not directly interfered with by the condition. The Court said this was a case where the injury sustained was practically contemporaneous with the accident and where the injury was clearly patent and not latent. Since he needed medical treatment and medical treatment is classed (Sec. 6 (33 U.S.C.A. 906)) as part of

the compensation to which the employee is entitled, the claim was barred because the employee's claim was not filed within a year after the injury occurred.

---

IS SECTION 930(f) RETROACTIVE?

If the right to compensation was vested at the time of the injury and Section 930(f) was purely statutory and not retroactive in its effect, then as the Court below said, the limitation of time would have run against the claim. That this right was vested is entirely supported by the cases cited and under this caption it will be noted too the case of *Marshall v. Pletz,* supra, upon which the Court below relied, had been overruled by our Supreme Court prior to the time the decision in the Court below was rendered.

If the decision objected to is good, then all employers and insurance carriers involved will have to reopen their files and take out every case of injury which occurred from the inception of this Act up to June 25, 1938, and report all injuries claimed where liability was properly denied and rights protected without the then necessity of reporting such claims.

The Court below also refers to *Marshall v. Pletz,* supra, for authority that a controversion notice must be filed by the carrier before the time would start to run, but from our reading of the Act and cases pertinent, and even the case of *Marshall v. Pletz,* we cannot see where such has any support.

In *Harris v. Traders & Gen. Ins. Co.,* 4 So. (2d) 24, it was said, where it is provided payment shall be

forever barred unless the parties shall have agreed upon a payment to be made or unless within one year after the accident proceedings were begun, such right was one of preemption and not prescription and therefore, since there had been no agreement for the payment of compensation within the one year limitation, the claim was barred because the employee had not filed a claim.

*Callahan v. Chesapeake & O. Ry.,* 40 F. Supp. 353, states the rule is stated in the syllabus from *Morrison v. Baltimore & O. Ry. Co.,* 40 App. D. C. 391, Ann. Cas. 1914C, p. 1026, as follows:

> "Under the Federal Employers Liability Act of June 11, 1906 (Fed. St. Ann. 1909 Supp., p. 585, the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right.
>
> This is a case in which a general statute of limitation is relied upon. In such case the statute must be plead. But it is a case in which the statutory remedy provides as a condition precedent that the action thereon must be commenced within a prescribed time. Such fact is jurisdictional and may be raised by motion to dismiss. *Bell v. Wabash Ry. Co.,* 8 Cir., 58 F. (2d) 569.
>
> It is a well recognized rule of statutory construction that a law will not be considered retro-

active unless such legislative intent clearly appears from the context of the statute itself. *Hassett v. Welch,* 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858, and cases cited in the opinion in that case.

It is significant that the enactment of August 11, 1939, makes no such provision. Had Congress so intended it would undoubtedly have said so."

In *Dawson v. Johncke Drydock,* 33 F. Supp. 668, it was said:

"In the case of *Young v. Hoage, Deputy Commissioner, et al.,* 1937, 67 App. D. C. 150, 90 F. (2d) 395, 400, it was definitely held that the provision of the Longshoremen's and Harbor Workers' Compensation Act, requiring a claim for compensation to be filed by survivors within a year after the death, is mandatory; and that compliance therewith is jurisdictional."

That an extension of a limiting statute must be definitely shown to be retroactive is clearly covered in *Dawson v. Columbia Casualty Co., et al.,* 1940 A. M. C. 1130.

*Ex parte Fidelity & Deposit Co. of Maryland,* 25 F. (2d) 642, well considers the question of whether or not statutory limitations after the creation of a right are retrospective or prospective and the Court said statutes are to be interpreted prospectively unless the language thereof requires contrary construction. It further held that where a right had become fixed, retroactive operation would not be practical, particularly if it destroyed a right.

In *In re Cederbaum,* 27 F. Supp. 1014, it was again said statutes granting a right or preventing the exercise of a right will be interpreted prospectively, unless the language thereof requires a different construction.

In *Colgate-Palmolive-Peet Co. v. U. S.,* 37 F. Supp. 794, it is stated that every statute operates on future acts unless a contrary intent is expressly declared.

Again in *Schwab v. Doyle,* 258 U. S. 529, it is said laws are not to be considered as applying to cases which arose before their passage unless that contention is clearly expressed.

Our contention is supported in *Hassett v. Welch,* 303 U. S. 303, which considered the question of when statutes were to be considered prospective or retrospective and the Court said:

> "In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;"

In *Young v. Hoage, et al.,* 90 F. (2d) 395, it was again clearly stated in 1937 that where a statute such as the Longshoremen's Act gives a right unknown to common law and limits time within which an action shall be brought to assert such right, the limitation of time within which to file the claim defines and controls the right. In other words, in the case at bar the right to file a claim for compensation is governed by the law at the time of the accrual of the right.

The Act as it previously stood was not illegal or unconstitutional and there was no necessity for retro-

active legislation to cure an administrative defect. Therefore, to attempt to make the amendment retroactive would be the taking of due process. There is no cure necessary to the previous provision and the amendment merely placed upon it an enlargement and therefore, in accordance with the annotations found in 70 A. L. R. 1436, it is quite evident the interpretation requested by Mr. Steffen and the Commission is entirely unsupported by present or previous decisions.

---

DECISIONS ON SIMILAR QUESTIONS.

To support our contention the right here was vested and the contention of the Court below is incorrect the following citations and authorities are made:

In *Luckenbach S. S. Co. v. Norton, et al.,* 106 F. (2d) 137, it was again said the right to reopen within one year of the date of the last payment, regardless of whether a compensation order has been issued, is remedial and therefore can be affected by a change in the specification of procedure, although the date of accident was prior to the adoption of the amendment. The Court said the amendment is not retroactive since the limitation is from the last payment of compensation. It referred to *American Mutual Liability Ins. Co. v. Lowe,* 85 F. (2d) 625, and *Bethlehem Shipbuilding Corp. v. Cardillo,* 102 F. (2d) 299.

If, as held in *Ocean Acc. & Guar. Co. Ltd. v. Lawson,* 145 F. (2d) 865, the limitation of Section 914(h) must be construed in harmony with and in conformity with Section 913(a), we cannot see how it can be

said Section 930(f) takes away the effect of the right of the employer or carrier to say that the claim must be filed within one year. The Court here said the right to file the claim was one of right and was in existence only one year.

*American Mutual Liab. Ins. Co. of Boston v. Lowe,* 1936 A. M. C. 1722, states:

> "The above statute was amended May 26, 1934, Chapter 354, Sec. 5, 48 Stat. 807, 33 Mason's U. S. C., Sec. 922, by inserting a provision therein limiting the right of the Deputy Commissioner to reopen the case to 'one year after the date of the last payment of compensation,' but the statute as amended gives no indication that it was to have a retroactive effect. Therefore it should not be so interpreted. *U. S. v. Heth,* 7 U. S. 399, 413; *Harvey v. Tyler,* 69 U. S. 328, 347; *Sohn v. Waterson,* 84 U. S. 596. It follows that the claims existing at the date of the amendment were not thereby destroyed and the time limitation therein prescribed began to run on the date of its enactment, May 26, 1934. *Sohn v. Waterson,* supra."

If the defense of the statute of limitations is jurisdictional, then in accordance with *Bethlehem Shipbuilding Corp. v. Cardillo,* 102 F. (2d) 299, if more than a year elapsed from the time of the injury and the filing of the application, the jurisdiction of the Deputy Commissioner is taken and therefore the date is an essential jurisdictional fact.

*Slade v. Branham,* 48 F. Supp. 769, is another case where it was held claim must be filed within a year and the right to file a claim was a statutory right and if not exercised within the time prescribed, there was

no longer the right. In this case the injury occurred on October 6, 1936, and no contention was made that there had to be a finding that Sec. 930(f) had to be complied with before the statute was said to have run.

---

THE KOBILKIN CASE.

*Kobilkin v. Pillsbury, et al.*, 103 F. (2d) 667, was decided by your Court and when taken to the United States Supreme Court the decision was sustained by a four and four decision on the petition for writ of certiorari, which placed it in the position of having been denied and therefore makes that decision not only controlling on the District Court below, but your Honorable Court as well. The reasoning applied in that opinion of your Court was avoided by the Court below and by respondents below. We say it is a well worded brief and opinion directed against the contentions of respondents heretofore made and which will be no doubt made to the appeal herein.

In this case one sustained an injury on June 7, 1935, and it was found he had a bad bruise which caused three weeks' disability. Thereafter, with some impairment he continued to work until January 9, 1937, when he had a severe pain in his shoulder and was then advised of a structural defect which was due to his injury of June 7, 1935. Less than two and a half months after being so advised he filed his claim which was denied by the Deputy Commissioner on the ground it had not been filed within one year of the last payment of compensation and was therefore

barred. Your Court considered the propriety of that decision and said the right to compensation for disability shall be barred unless a claim therefor is filed within one year after the *injury,* thereby distinguishing between the words "injury" and "disability". It was pointed out the appellant therein claimed the nature of the original injury had been overlooked, and the necessity for an operation was not known until January, 1937, and since the exact nature of the injury was not known until more than a year after the payment of compensation, the time did not begin to run until the existence of the injury could be reasonably ascertained, and such was the rule where injuries were latent and not patent. Your Court stated the case of *Kropp v. Parker,* 8 F. Supp. 290, on which the Court and respondents below relied, might lean towards the contention made if the situation were one of industrial disease and as was covered in the case of *Di Giorgio Fruit Corp. v. Norton,* 93 F. (2d) 119. Your Court said: "but if the condition there dealt with was purely an accidental injury, and not an occupational disease or infection, we are not able to understand the Court's implied conclusion that it arose 'in the course of employment'." Your Court then went on to say, "decisions arising under statutory provisions analogous to the Federal Act generally hold that the date of injury, and not the subsequent date when incapacity develops is the one from which the time limitation must be reckoned."

It was also said by your Court, "The terms 'injury' and 'disability', separately defined in the statute, are

not synonymous." It was also said the injury was an accidental one which was inflicted at the time of the accident, and the statute then began to run, and not when the full extent of the injury was first noted. It was said:

> "The trauma in fact resulted in an immediate though temporary disability for which the appellant was paid compensation. The circumstance that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. * * *
>
> It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate; and nothing short of legislation would make relief possible in a case like this."

Your Honorable Court held the terms "injury" and "disability" are not synonymous and if there was knowledge of injury, although not the consequent development was known or anticipated, there was at that time an injury and the statute ran against the injury. It was not held the time did not run until there was disability or a full knowledge of the cause

of the disability. Mr. Steffen knew he hurt his back in February, 1938, as shown by the evidence heretofore quoted, and therefore, the time began to run at the time of the alleged injury in February, 1938, and there was no support for the District Court below or the Deputy Commissioner to find that the date of injury did not occur until there was disability from work.

There is the further complication in that the Court below agreed with the Deputy Commissioner the disability occurred after the amendment and for all intents and purposes the injury did not occur until there was a disabling injury when, as a matter of fact, there was an injury and a known injury which required medical treatment at the time of the accident. It must be remembered that in this case of *Kobilkin,* supra, your Court said:

> "The circumstances that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. If we turn to Section 22 and assume a change of condition we again encounter the stautory bar."

THE PLETZ CASE.

The Court below stated it was of the opinion that *Marshall v. Pletz,* 1942 A. M. C. 627 at pages 631-632, in effect stated the time limit prescribed by Section 913(a) does not commence to run until the right to further payment of compensation is controverted, but this case did nothing more than hold there was a situation of laches, and therefore Mr. Pletz filed within a reasonable time.

Mr. Pletz was injured on November 12, 1935, and filed claim for compensation on April 19, 1937, and on May 6, 1937, a notice was filed with the Deputy Commissioner to the effect that the claim would be controverted. The claim was rejected by the Deputy Commissioner on July 29, 1937, and the case went to the District Court which remanded the matter for further proceedings. A new award was made on February 14, 1940, again rejecting the claim. The Court then found no compensation was paid to or accepted by the employee and on May 6, 1937, more than one year after his injury, a formal claim was controverted as aforesaid.

The decision found in 1942 A. M. C. 627, is the one from which the Court below has concluded that your Honorable Court has at least by inference said where there is the failure to follow the prerequisites of Section 930(f), as under the circumstances of this case, the time limit prescribed by Section 913(a) does not commence to run until the right to compensation is controverted. After going over the facts, and considering the statements of the Court below, your Court

said it appeared the carrier, since the man was offered compensation and refused it, under the circumstances assumed it was entitled to defer controverting liability until a formal claim was filed. Your Court said, "We are satisfied that in this both the carrier and the Commissioner mistook the requirements of the act." It is then said Section 913(a) gives the employee a year after cessation of payment of compensation or *injury* to file claim and that where payments are stopped or suspended the employee is put on notice he must make formal claim within a year or forego further compensation. It was contended there, as in the case at bar, where there was a continuing offer of compensation, the employee is entitled to assume the carrier holds itself in readiness to pay the sum offered and that he may dispense with the filing of a claim so long as that situation exists. Your Court then said:

> "We think, therefore, that the time limit prescribed by Section 13(a) applies not only to cases where compensation is actually paid but to situations where the statutory compensation is tendered, and the time limit does not commence to run until the continuing offer is withdrawn or the right to further payment is controverted. For the purpose of limitation, tender must be held the equivalent of payment."

The rest of the decision of your Court is to the effect that if, for any cause, an employer considers his obligation to make payment is terminated, he must immediately and unequivocally make his position known. This, of course, is in the face of there having

been a tender. This is all the case holds and we cannot see how by inference in any way it can be said the Court below was justified in interpreting the effect of the decision as it did.

When this *Pletz* case, cited as *Marshall, et al. v. Pletz,* 1943 A. M. C. 9, went to the Supreme Court, that Court said your Honorable Court had held that Section 914 of the Act required an employer or insurer who denies liability to file with the Deputy Commissioner a notice of controversion so as to bring on the question of liability for decision. The Supreme Court said, however, such construction was inadmissible as tender was not payment and under the Act there could be no contention of estoppel and that nonetheless Mr. Pletz was bound to file his claim within the statutory period of one year of his injury or the date of the last payment of compensation.

Where from the foregoing can it be said the Court below was supported in saying it thought your Court in effect had said "that the time limit prescribed by Section 13(a) does not commence to run until the right to further payment of compensation is controverted."

The premise for the decision does not exist and therefore it must be held to be of no effect.

## CONCLUSION.

We believe it clear from the foregoing that Section 930(f) is not retroactive in its effect. It would be impractical to say it was, and as well all rules of statutory interpretation prevent the finding it was retroactive and particularly because it does not show any legislative intent that it be retroactive. The Court below has admitted if not retroactive, the claim of Mr. Steffen was barred.

The case of Pletz on which the Court relied had been overruled when the opinion was handed down, making its authority a nullity.

The suffering of a disability is not that which is necessary to start the running of the statute. Compensation does include money claimed for treatment obtained after notice to the employer. As your Court so aptly held in the case of *Kobilkin,* supra, an intelligent reading of the statute shows that the time began to run at the time of injury. To accept the opinion of the Court below would be to say that if anyone was injured before June 25, 1938, and liability had been denied without notice to the Commission, the statute could not be used as a defense although one had been guilty of laches in bringing their action for ten, fifteen or twenty years.

As provided in Section 913(a), it is for the employee to file a claim within one year of the date of injury or the last payment of compensation for jurisdiction to be created, and certainly this Respondent Steffen failed to do. Something positive was required of him and this he did not do until he filed claim for

compensation benefits in January, 1941. The *Kobilkin* case is full authority for our contention and should have been controlling on the Court below.

We submit the decision of the Court below should be set aside and Respondent Steffen granted nothing.

Dated, San Francisco,
September 8, 1944.

Respectfully submitted,
S. S. Tipton,
W. N. Mullen,
*Attorneys for Appellants.*